IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 675.

HENRY E. BECKER, *Petitioner*

v.

ROBERT C. SOLOMON, Trustee, Etc., *Respondent.*

PETITIONER'S REPLY BRIEF.

Respondent's brief in opposition to the petition for writ of certiorari, in the subject case, is not directed to the main point at issue, namely, the denial of due process by the District Court and, notwithstanding an observance of such denial, an affirmance and reaffirmance thereof by the Court of Appeals (R. 66, 88, 94).

In the first paragraph of the Statement, Respondent recites facts which have no bearing on the issue here and, presumably, there recited to poison the mind of this Honorable Court with irrelevant facts which, if sustained in a proper proceeding in the court of first instance, might have been made the basis of appropriate civil actions by the injured parties, or of appropriate criminal proceedings in

the District Court, under the criminal code. Another injection of this venom is to be found in the first paragraph of the Argument.

Respondent recites that it was:

> "disclosed that he (Becker) was financially able to comply with the turn-over order. At the time of the contempt order, Becker owned a home in Evanston, Illinois, title to which was in his wife's name." (p. 4)

The Court is not informed, however, that the home was bought by Mrs. Becker, "direct from a G. I.", long before any bankruptcy proceedings (R. 53). The same with respect to the time of purchase of "four (4) parcels of improved real estate at Carlinville, Illinois, tenanted by a tavern, ice cream shop, barber shop, fruit shop, etc." (p. 4), citing (T. 53-54), and all of which were subject to heavy purchase-money mortgages (R. 53-54).

Respondent states that: "The Petitioner, Becker, was evasive and incredible." (p. 4)

Evasive and incredible as to what testimony? Was it the irrelevant and immaterial testimony extracted on cross examination and permitted by the trial court, or was it the testimony as to what disposition Becker had made of the abstracted funds and found by the Court of Appeals to be "relevant and material", but which the trial court refused to admit or listen to and rejected in the following language:

> "Well, I have already ruled, Mr. Seyfrit, that I would not let you offer evidence to show what became of those checks that the Referee has specifically found and traced into the possession of the Respondents." (R. 66)

Surely, the reference is not to the clear and unequivocal testimony of Becker, as follows:

> BECKER, appearing as a witness in his own behalf, having been duly sworn, testified as follows: (R. 52)
> Mr. Seyfrit. Do you have any money or assets

from which money could be derived or any credit where you could get money to pay this Order or any part of it at this time, today?

A. I have borrowed to the limit. I don't know where.

Q. You can answer this question yes or no. Can you pay any part of it now?

A. I don't think so, sir.

Q. Are you in debt at the present time?

A. Yes, sir. I owe close to a half million dollars: (R. 57)

When the Trustee instituted the contempt proceeding, he tendered an issue of contemnor's then present wilful disobedience to the order. This issue should have been tried just as any other factual issue, and the court should have admitted and considered all testimony and evidence relevant to it. (*Maggio* v. *Zeitz*, 333 U. S. 56, 74)

The burden in such a proceeding is on the Trustee to prove by clear and convincing evidence that the property abstracted from the bankrupt estate is then in the possession or under the control of the party being proceeded against (id. 64).

The Trustee offered no evidence or testimony whatsoever as to what, if any, portion of the abstracted funds were in the hands of Becker at the time of the contempt proceeding. He came into court relying on the "continuing in possession" theory and seeking a conviction for contempt, regardless of the contemnor's then present inability to conform with the turn-over order. His position was sustained by the trial court (R. 66), and affirmed (R. 88) and re-affirmed (R. 94) by the Court of Appeals.

Respondent informs us that the court below "has afforded Petitioner the opportunity to show his inability to comply with the turn-over order." (p. 11)

Petitioner concedes that the decision of that court contains a subtle suggestion that he slither back to the District Court and enter in a posture no higher than his knees and, perchance the trial court has had a penitent change of heart or pang of conscience, he may be accorded due

process within the purview of the decision of this Honorable Court, as expressed in the *Maggio* decision. And this notwithstanding the affirmance and re-affirmance of the prior denial.

Petitioner is not asking for such meaningless suggestion or invitation. He seeks only a guaranteed right to be permitted to establish impossibility of performance in strict accordance with due process.

Respondent volunteers the inferences that;

> "No explanation has ever been given as to the whereabouts of said funds or what was done with said funds except the bald statement they are not in his possession. He had ample opportunity to show his inability to comply with the turn-over order. No showing was made." (pp. 10-11)

In the light of the statement of the District Court: "*Well, I have already ruled, Mr. Seyfrit, that I would not let you offer evidence as to what became of those checks,*" etc., it is not surprising to find that there are no citations to the record that might tend to elevate those inferences to the status of facts. (R. 66; *Italics supplied.*)

Respondent, at this point, seems to be banking on the dubious assumption that this Honorable Court will not take cognizance of the offer of such testimony on behalf of Brock, one of the contemnors, and the objection to such testimony by Mr. Pefferle (R. 36), attorney for the Trustee there and here, which objection was sustained by the trial court (R. 41); the renewal of the offer on behalf of Brock and Becker (R. 65); and the reiteration by the trial court of its refusal to admit or listen to such testimony on behalf of either of the contemnors (R. 66); and to all of which the attention of this Honorable Court was directed by appropriate citation in the petition herein. (p. 4, Para. 5)

Conclusion.

Petitioner respectfully represents that the sole issue before the Court of Appeals was the question of law arising by reason of the District Court having denied to this Petitioner the right to establish his then present inability to conform to the turn-over order.

The sole issue before this Honorable Court is the question of the propriety of the Court of Appeals in affirming and re-affirming the action of the District Court, in that regard, and sustaining the order of commitment of this Petitioner, notwithstanding its observance of a clear and unmistakable denial of due process.

The petition should be granted; the court below reversed; and the Petitioner accorded not less than the undeniable right to go back to the District Court as a free man seeking justice, and not that of a criminal in shackles pleading for mercy from a court that has already denied him a fair trial with the approval of the Court of Appeals.

Respectfully submitted,

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